No. 89-1511

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN MINING CONGRESS and SOLITE CORPORATION,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The United States Environmental Protection Agency ("EPA" or "the Agency") has filed a brief ("EPA Br.") that attempts to bolster the flawed opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") with meritless arguments never before presented by EPA or the Court of Appeals. This reply clarifies the important issues presented in the Petition for Certiorari of American Mining Congress and Solite Corporation ("Pet.").

REASONS FOR GRANTING THE WRIT

Disregarding the text of a statute to effectuate its "spirit" is probably never justifiable.[1] Certainly, statutory language cannot be ignored where doing so *undermines* the "spirit" of a statute, as well as its plain meaning. Unfortunately, that is what the Court of Appeals did in this case.

Congress explicitly exempted "Bevill wastes" from regulation under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"),[2] pending completion of a special study and Regulatory Determination, because of concerns that such regulation would have devastating economic impacts and would not be warranted in light of the unique nature of Bevill wastes[3] and the fundamental importance to the nation's economy of the industries that generate them.[4] The Court of Appeals, however, ignored the plain language of the statute and allowed EPA summarily to subject Bevill wastes to the single most costly component of Subtitle C—corrective action under section 3004(u), 42 U.S.C. § 6924(u). Indeed, the Court of Appeals allowed EPA to impose these requirements on Bevill wastes despite a prior Regulatory Determination that such regula-

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[1] *See Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 107 S. Ct. 1442, 1472 (1987) (Scalia, J., dissenting) (favoring reversal of a decision that "disregarded the text of [a] statute, invoking instead its 'spirit.' "); *United States v. Johnson*, 107 S. Ct. 2063, 2073 (1987) (Scalia, J., dissenting) (questioning whether a court "can ever be justified in holding . . . that Congress did not mean what it plainly said in [a] statute.").

[2] 42 U.S.C. §§ 6921-6939b.

[3] *See Environmental Defense Fund v. United States Environmental Protection Agency*, 852 F.2d 1309, 1314-15 (D.C. Cir. 1988) ("*EDF v. EPA I*"). Congress in 1984 acknowledged once again that Bevill wastes have "special characteristics." 42 U.S.C. § 6924(x).

[4] Bevill wastes are generated by the mining, utility, and cement kiln industries. *See* 42 U.S.C. § 6921(b)(3)(A). The legislative history of the Bevill exemption stresses the economic importance of these industries. *See* Pet. at 17 n.42.

tions are *not* warranted for certain Bevill wastes. Such a flagrant violation of the language and spirit of a statute that has such serious consequences for the United States economy should not go unchecked by this Court.

I. THE DECISION BELOW IGNORES THE REPEATED ADMONITIONS OF THIS COURT THAT REVIEWING COURTS MUST GIVE EFFECT TO THE PLAIN LANGUAGE OF STATUTORY PROVISIONS

A. The Decision Below Violates The Plain Language Of The Bevill Amendment

The Court of Appeals conceded that "the linguistic case for exemption [of Bevill wastes] from corrective action [under section 3004(u)] is quite powerful."[5] Nevertheless, the Court of Appeals refused to give effect to the plain language of the statute, and instead came to precisely the opposite result. In this way, the Court of Appeals ignored the admonitions of this Court that "[i]f the intent of Congress is clear, that is the end of the matter."[6]

Apparently sensing a fatal weakness in the Court of Appeals' opinion, EPA has invented a new theory to explain why the plain language of RCRA does not compel a reversal by this Court. EPA now argues for the first

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[5] *American Iron and Steel Institute v. United States Environmental Protection Agency*, 886 F.2d 390, 395 (D.C. Cir. 1989) ("*AISI v. EPA*"); Pet. App. at 6a. The Bevill Amendment exempts Bevill wastes from regulation under Subtitle C until EPA completes a special study and makes a Regulatory Determination whether such regulation is warranted. 42 U.S.C. § 6921(b)(3)(A). Section 3004(u) is "indisputably" located in Subtitle C. *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a. Moreover, EPA has never made a Regulatory Determination that regulation of Bevill wastes under section 3004(u) is warranted. In fact, EPA has determined that section 3004(u) regulation is *not* warranted for one class of Bevill wastes. Pet. at 19-21. Thus, under the plain language of RCRA, Bevill wastes are currently exempt from section 3004(u).

[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

time that the Bevill Amendment does not apply to section 3004(u), because the Bevill Amendment prohibits the "regulation" of Bevill wastes under Subtitle C, and Bevill wastes are not "regulated" under section 3004(u). EPA Br. at 10.

The Agency is playing word games. The word "regulate" means "to bring under the control of law or constituted authority."[7] There can be no question that section 3004(u) controls solid wastes and the units in which they are managed.[8] Moreover, section 3004(u), like all other Subtitle C requirements, is being implemented through the adoption of regulations.[9]

There is simply no way to read the plain language of the Bevill Amendment to allow Bevill wastes to be regulated summarily under section 3004(u).[10] Thus, despite EPA's claim to the contrary, the decision below is not "consistent with well-established principles of statutory construction."[11]

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[7] Webster's Third New International Dictionary, G. & C. Merriam Co. 1913 (1981).

[8] Indeed, EPA admitted as much in this rulemaking, where the Agency stated that "[one] commenter conceded that [Bevill] wastes are 'solid wastes' subject to corrective action regulation under Subtitle D. . . . It is . . . logical and consistent with Congressional goals to conclude that these solid wastes are similarly subject to . . . section 3004(u)." 52 Fed. Reg. 45,788, 45,790 (1987); Pet. App. at 59a-60a.

[9] *See* 40 C.F.R. § 264.101(a) (1989) (codifying section 3004(u)), Reply App. at 1a; 55 Fed. Reg. 16,859 (1990) (announcing the development of corrective action regulations under section 3004(u)), Reply App. at 2a.

[10] Even if the Bevill Amendment could be read in such a way, EPA's *post hoc* legal theories should not be considered by this Court. *See Miree v. DeKalb Cty., Ga.*, 433 U.S. 25, 33-34 (1977) ("The fact that [a legal theory raised for the first time in this Court] is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed in . . . the Court of Appeals, we will not consider it.").

[11] EPA Br. at 8. EPA also argues that the Bevill Amendment pro-

B. The Decision Below Cannot Be Reconciled With The Plain Language Of Section 3004(x)

The Court of Appeals recognized that its conclusion that Congress in 1984 could have intended Bevill wastes to be automatically subjected to regulation under section 3004(u) is difficult to reconcile with the plain language of section 3004(x), 42 U.S.C. § 6924(x), which authorizes EPA to modify section 3004(u) for Bevill wastes, but only *in the event that* the Agency determines Subtitle C regulation of such wastes is warranted.[12] Therefore, in an effort to "make[ ] sense"[13] of section 3004(x), the Court of Appeals put forth, *sua sponte*, a novel and erroneous interpretation of section 3004(x) that fails to give effect to the plain language of that provision. *See* Pet. at 14-17.

EPA did not advance, and does not endorse here, the Court of Appeals' interpretation of section 3004(x). Instead, EPA has concocted a new and equally meritless theory for reconciling section 3004(x) with its view of the applicability of section 3004(u) to Bevill wastes.[14] According

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hibition on regulation of Bevill wastes under Subtitle C should not apply to section 3004(u) because the corrective action requirement "extends to releases of toxic substances from solid wastes that do not themselves qualify as hazardous wastes and thus are not subject to the Subtitle's comprehensive regulatory scheme." EPA Br. at 8. The Agency is correct that section 3004(u) "sweeps far more broadly than the rest of Subtitle C." *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a. However, that does not alter the fact that section 3004(u) is a Subtitle C requirement, and therefore, by the terms of the Bevill Amendment, cannot be imposed on Bevill wastes in the absence of a Regulatory Determination that such regulation is warranted.

[12] *See AISI v. EPA*, 886 F.2d at 396; Pet. App. at 8a.

[13] *Id.*

[14] Because section 3004(x) is the only RCRA provision that directly addresses the relationship between the Bevill Amendment and section 3004(u), it is remarkable that EPA has waited until this late date to attempt to reconcile section 3004(x) with the Agency's view of the applicability of section 3004(u) to Bevill wastes. In the rulemaking at

to EPA's new theory, section 3004(x) was intended to allow modification of "some applications" of section 3004(u) to solid waste units at facilities where "hazardous" Bevill wastes are managed. EPA Br. at 16. EPA fails to specify what those "applications" might be, and with good reason. There are only two potential options, and each one leads to absurd results.

First, section 3004(x) could have been intended to allow modification of section 3004(u) for units that manage "hazardous" Bevill wastes. Under this theory, however, section 3004(x) would not be available for "non-hazardous" Bevill wastes. As a result, "hazardous" Bevill wastes would potentially be subject to less stringent requirements than "non-hazardous" Bevill wastes. Congress could not possibly have intended such a bizarre result.

Second, section 3004(x) could have been intended to allow modification of section 3004(u) for units that manage "non-hazardous" Bevill wastes at facilities where "hazardous" Bevill wastes are also managed. It would have made little sense, however, for Congress to have provided regulatory relief to "hazardous" Bevill wastes by authorizing EPA to modify the rules for "non-hazardous" Bevill wastes that may, by chance, happen to be located at the same facilities.[15]

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issue, EPA did not so much as mention section 3004(x). Similarly, in its briefs to the Court of Appeals, the Agency mentioned section 3004(x) only in passing. EPA has therefore failed to "properly and faithfully discharge[ ] its responsibility to harmonize [all relevant] statutory provisions." *Citizens to Save Spencer Cty. v. United States Environmental Protection Agency*, 600 F.2d 844, 851 (D.C. Cir. 1979).

[15] Section 3004(x) could have also conceivably been intended to allow modification of section 3004(u) for units that manage *non*-Bevill wastes at facilities where "hazardous" Bevill wastes are managed. Once again, however, this theory would condition regulatory relief for "hazardous" Bevill wastes upon the existence of non-Bevill wastes at the same facilities. Moreover, this theory is precluded by the plain language of section 3004(x), which authorizes EPA to modify section 3004(u) "in

EPA and the Court of Appeals have tried unsuccessfully to "make[ ] sense" of section 3004(x), given their views of the applicability of section 3004(u) to Bevill wastes. In doing so, however, they have ignored the plain language of section 3004(x).[16] That section makes clear that application of section 3004(u) to Bevill wastes is not automatic, but conditioned on a Regulatory Determination, made in accordance with the Bevill Amendment, that such regulation is warranted.[17]

II. THE DECISION BELOW UNDERMINES THE PURPOSE OF THE BEVILL AMENDMENT

Congress' chief concern in enacting the Bevill Amendment was "the potential for disruptive economic impacts" if three industries of vital importance to the United States economy—the mining, utility, and cement kiln industries—became subject to regulation under Subtitle C. Pet. at 17. According to the Court of Appeals, section 3004(u) "in no way implicates the concern that gave rise to [the Bevill Amendment]."[18] EPA similarly states that the Bevill process is "logically irrelevant" to the imposition of section 3004(u) requirements on Bevill wastes.[19]

It is incomprehensible how EPA and the Court of Appeals could have reached these conclusions. Section 3004(u) is by far the single most costly component of Subtitle C. Pet. at 18-19. Congress could not have been con-

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the case of landfills or surface impoundments receiving [Bevill] solid waste[s]." 42 U.S.C. § 6924(x).

[16] Significantly, neither EPA nor the Court of Appeals cited any statutory language or legislative history in support of their novel theories for interpreting section 3004(x). No such support exists.

[17] Of course, in the absence of such a determination, releases from units containing Bevill wastes are subject to all other applicable federal and state regulatory requirements, including RCRA Subtitle D.

[18] *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a.

[19] EPA Br. at 14, *quoting AISI v. EPA*, 886 F.2d at 395; Pet. App. at 7a.

cerned about the economic effects of regulating Bevill wastes under Subtitle C and also be insensitive to the effects of regulating such wastes under the most costly element of that program.

The Court of Appeals worried that if Bevill wastes were not immediately subject to the requirements of section 3004(u), such wastes would effectively be "elevate[d] . . . to a privileged position above all other nonhazardous solid wastes."[20] EPA echoes this theme, asserting that "there is no reason why Congress would have chosen to require [a] facility whose releases do not emanate from Bevill waste to take corrective action" while not requiring a facility whose releases *do* emanate from Bevill wastes to take corrective action. EPA Br. at 13-14.

Both the Court of Appeals and EPA have forgotten that the fundamental purpose of the Bevill Amendment is to place Bevill wastes in a special position with respect to other solid wastes, at least pending completion of the Regulatory Determination process.[21] To deny this special status, as the Court of Appeals has done, is to rewrite the plain language of the Bevill Amendment and section 3004(x), to reject the intent of Congress, and to subject the three Bevill industries to devastating costs without a prior determination that such costs are warranted.

III. THE DECISION BELOW EVISCERATES A PRIOR REGULATORY DETERMINATION BY EPA

In its 1986 Regulatory Determination,[22] which was upheld by the Court of Appeals,[23] EPA decided that regu-

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[20] *AISI v. EPA*, 886 F.2d at 395-96; Pet. App. at 8a.

[21] Indeed, section 3001(b)(3)(A)(ii) of the Bevill Amendment explicitly exempts from Subtitle C regulation "*solid waste* from the extraction, beneficiation, and processing of ores and minerals," pending completion of the Bevill Amendment process. 42 U.S.C. § 6921(b)(3)(A)(ii) (emphasis added).

[22] 51 Fed. Reg. 24,496 (1986); Pet. App. at 48a.

[23] *EDF v. EPA I*, 852 F.2d at 1309.

lation under Subtitle C is not warranted for one category of Bevill wastes—extraction and beneficiation wastes from the mining industry. Pet. at 19-21. EPA now baldly asserts that the 1986 Regulatory Determination did not include a finding that such wastes should be exempt from section 3004(u). EPA Br. at 17-18. The Agency, however, ignores that the 1986 Regulatory Determination spoke broadly about the inappropriateness of "Subtitle C controls" for extraction and beneficiation wastes,[24] and section 3004(u) is "indisputably" a Subtitle C control.[25] Moreover, EPA in the 1986 Regulatory Determination explicitly considered, but decided against, applying section 3004(u), as modified under section 3004(x), to extraction and beneficiation wastes.[26]

The decision of the Court of Appeals therefore eviscerates EPA's 1986 Regulatory Determination and exposes extraction and beneficiation wastes to the most costly component of Subtitle C, even though EPA has already decided that Subtitle C controls are not warranted for such wastes.

CONCLUSION

The Petition for Certiorari should be granted because the decision of the Court of Appeals violates the plain language of RCRA and undermines the special regulatory approach that Congress viewed as an essential safeguard against the unwarranted regulation of three industries of critical importance to the United States economy.

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[24] 51 Fed. Reg. at 24,496; Pet. App. at 48a.

[25] *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a.

[26] The 1986 Regulatory Determination addresses modification of the RCRA requirements related to "continuing releases at permitted facilities." 51 Fed. Reg. at 24,500; Pet. App. at 54a. The reference is unquestionably to section 3004(u), which is entitled "Continuing releases at permitted facilities." 42 U.S.C. § 6924(u).

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June 11, 1990

APPENDIX

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CODE OF FEDERAL REGULATIONS
Title 40

* * *

§ 264.101 Corrective action for solid waste management units.

(a) The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.

* * *

Regulatory Agenda
April 23, 1990
55 Fed. Reg. 16,859

* * *

3282. CORRECTIVE ACTION FOR SOLID WASTE MANAGEMENT UNITS (SWMUS) AT HAZARDOUS WASTE MANAGEMENT FACILITIES

Significance: Regulatory Program

Legal Authority: 42 USC 6924 / RCRA 3004(u), 3004(v)

CFR Citation: 40 CFR 264; 40 CFR 270

Legal Deadline: None

Abstract: These regulations set forth the technical and procedural requirements for conducting corrective action to clean up significant releases to air, surface water, ground water and soil at solid waste management units (SWMUs) at operating, closed, or closing RCRA facilities. The regulations will be used to define the structure of the program, and the requirements for implementing remedial action, remedy selection and corrective measures. Currently, the permitting agencies must make case-by-case decisions on action.

* * *